Testimony that the action was so approved was given in the District Court by Mose Silverman, Assistant General Counsel for respondents Home Loan Bank Board, (oral testimony affidavit in District Court March 10, 1952).

Court Appoints Receiver to Sue Makers, Insurers and Others Who Payee of Notes Would Not Sue.

At this juncture and in order that suits would be brought on causes of action omitted by San Francisco Bank and to prevent the running of the Statutes of Limitation, the District Court, on March 15, 1952, appointed petitioner's predecessor receiver for the protection of the funds in the Registry of the Court. (App. pp. 116 ff.)

It is noteworthy that a receiver was not appointed until the litigation in the consolidated action had progressed to the District Court and the Court of Appeals and this Honorable Court over a period of over six years. (14 F. R. D. 273, pp. 280-282.)

During that time and before your petitioner's appointment twenty-one writs, appeals and similar court proceedings had been taken. In addition, more than fifty final judgments had been entered quieting title. (14 F. R. D. 273, at p. 306), interpleading assets (14 F. R. D. 273, at p. 308), removing respondent conservator (14 F. R. D. 273, at p. 319), requiring an accounting (14 F. R. D. 273, at p. 320 and 14 F. R. D. 273, at pp. 315-321) and many others.

Petitioner Receiver Was Appointed in Class Action to Protect Beneficiaries Whom Trustee Refused to Protect.

Petitioner receiver was appointed on the application of First Federal Savings and Loan Association of Wilming-

ton, one of the class of 300 stockholder-members of respondent San Francisco Bank. (App. p. 162.)

Said Wilmington Association sought appointment of said receiver to protect it and all other member stockholders and to preserve their savings deposits represented by said four notes with unpaid balance of $7,000,000.00. (App. pp. 126-129.)

Such protection was required in order to preserve the causes of action against the maker of said notes respondent Ammann conservator, said Ammann's bonding company and respondent Federal Savings and Loan Insurance Corporation and others. (App. p. 143.)

Only Appellants From Order Appointing Receiver Were Defendants Which Receiver Sued by Order of United States District Court.

It is significant that the only appellants from the order appointing the receiver and from the order of the Court allowing the receiver costs to defend the appeal from the order appointing him, are (with the exception of San Francisco Bank) all defendants sued by said receiver upon the express direction of the United States District Court. (App. p. 143.)

Court of Appeals Reverses Without Printed Record, Briefing, or Consideration on the Merits.

On motion of appellants, the Court of Appeals has summarily reversed both the order appointing the receiver, and the order allowing the receiver's counsel costs to defend the appeal from the order appointing the receiver. The Court of Appeals has further ordered dismissal without hearing or consideration of the actions brought by the receiver against the defendants sued by express direction of the District Court. (App. p. 11.)

Such action by the Court of Appeals is without any consideration of the merits or facts and is based solely on a claimed lack of jurisdiction of the District Court to take any action to preserve the $14,000,000.00 of assets on deposit in the Registry for more than six years.

By the ruling of the Court of Appeals, the District Court is held without power[3] to even prevent expiration of the statute of limitations upon four notes totalling $7,000,000.00 physically in the custody of the District Court, at the moment when the statute of limitations threatened to expire. (App. p. 143.)

In April, 1952, the United States Court of Appeals had rendered a decision (reported 196 F. 2d 336) and in November, 1952, another decision (reported 200 F. 2d 420) in the consolidated actions. When petitions for certiorari were denied by this Honorable Court the Court of Appeals issued a consolidated mandate directing the District Court to dismiss Federal Home Loan Bank of Los Angeles, *et al.* v. Federal Home Loan Bank of Portland, *et al.* in its entirety and to dismiss certain pleadings only in Mallonee, *et al.* v. Fahey, *et al.*, leaving other pleadings in the consolidated action still pending.

Thereupon, and before a record was printed in the United States Court of Appeals covering San Francisco Bank's two appeals from the orders concerning your petitioner as receiver, and before your petitioner could file briefs to present his side of the matter, San Francisco Bank on the strength of the above-mentioned opinions and mandate, made motions to remand their own appeals

---

[3]See Appendix, page 10, where the Court of Appeals said: ". . . The appointment of a receiver was a nullity and the purported receiver was without power to act."

involving the receiver to the District Court, asking that the District Court be directed to vacate the order of the receiver's appointment and the order allowing him costs.

These motions were granted without consideration of the merits of his appointment. The District Court was further summarily directed to dismiss actions which the receiver had brought, although the Court of Appeals did not have any of these actions before it. This action is clearly unprecedented and not even plausible, unless it is noticed that *contrary to its own previous mandate,* the Court of Appeals held in its opinion ordering these sweeping steps, that

> "the District Court was without jurisdiction of the subject matter of either of said consolidated actions."

The opinion containing these rulings and directions is reported in Adv. Fed. 2d, Vol. 208, at page 197, No. 2, issue of January 25, 1954. It is also pages 4 to 12 of the Appendix filed herewith.

Dismissal of Receiver's Action After Expiration of Statute of Limitations May Render Trustee Assets Valueless.

If the judgment of the Court of Appeals be carried out and the petitioner's appointment as receiver be reversed without consideration on the merits, and the actions brought by petitioner receiver be dismissed without hearing or trial, respondents will have succeeded in escaping all liability: (1) by respondent Ammann, conservator sole signer of said notes, (2) Ammann's $100,000.00 Surety bond which would be liable if said notes be unenforceable due to misconduct of said Ammann, and (3) respondent Federal Savings and Loan Insurance Corporation which has charged or collected insurance premiums

aggregating over $200,000.00 based in part upon insurance of said $7,000,000.00 of principal and interest on said notes. Also other respondents will all escape any adjudication on the merits of their liabilities for such obligations.

If Long Beach Association then successfully defends against the foreclosure of said notes, all three hundred savings associations must bear the loss of approximately $7,000,000.00 which will be occasioned thereby.

United States District Court Has Jurisdiction Over Actions Alleging Seizures in Violation of United States Constitution.

The complaints in both actions in the District Court (filed by the Los Angeles Bank stockholders and the Long Beach Association Shareholders' Protective Committees in 1946) both allege that the seizures of their respective institutions were without due process of law, in violation of the Fourth and Fifth Amendments of the United States Constitution, were beyond statutory authority, malicious, arbitrary, capricious and void.

The Long Beach Association's shareholders complaint was before the United States Supreme Court in *Fahey v. Mallonee,* 332 U. S. 245, 91 L. Ed. 2030, and was summarized by the court at page 247:

> ". . . The complaint alleged that the Conservator and the Chairman seized the property without due process of law, motivated by malice and ill will and that the seizure for various reasons was in violation of the constitution . . ."

Pending final decision of these constitutional questions, the District Court appointed petitioner receiver to preserve against the expiration of the statute of limitations,

the notes and assets on deposit in the registry of the court for the benefit of whoever, among the many litigants or non-litigants, was eventually determined to be the true owner thereof.

Questions Presented.

(1) Whether the Court of Appeals incident to a motion to remand appeals and to vacate the orders appealed from, can contradict and enlarge its prior mandate in these actions, issued after its decisions therein had become final by denial of certiorari, which mandate ordered the dismissal only of some of the pleadings in the consolidated action, and state for the first time incident to its ruling on the motions to remand appeals that "the District Court was without jurisdiction of the subject matter of either of said consolidated actions."

(2) Whether a complaint alleging the seizure of private property by Governmental agencies without due process of law and motivated by malice and ill-will in violation of the United States Constitution "present . . . justiciable controversy within the jurisdiction of the Federal Court" or whether such a complaint seeks "functions . . . beyond the power of the District Court to undertake . . ."

(3) Whether the District Court confronted with complaints raising difficult and complicated constitutional and jurisdictional questions incident to which approximately $14,000,000.00 have been interplead in its registry, must stand idly by and permit loss and destruction of these assets by the running of the statute of limitations where the funds in question represent ultimately the life savings of thousands of small depositors, or whether he has power,

until a decision of the question may be had, to appoint a Receiver for the limited purpose of bringing actions on the assets in the registry to prevent their becoming lost or extinguished by running of the statute of limitations.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1.

Court of Appeals Expands and Misconstrues Its Prior Opinions and Mandates.

The present opinion of the Court of Appeals stating "that the District Court was without jurisdiction of the subject matter of either of said consolidated actions" is in direct conflict with prior decisions of the Court of Appeals in the same matter, one of which (196 F. 2d 366) held and stated "that the said order for preliminary injunction be, and the same is, hereby reversed and the court below is directed to vacate and set aside the same injunction" and the other of which (200 F. 2d 420) held and stated "we remand the case before us with directions to the lower court to dismiss the Los Angeles action, said Los Angeles action being only one of the consolidated actions." The mandate issued pursuant to the decisions in 196 F. 2d and 200 F. 2d, when they became final by denial of writ of certiorari, directed the dismissal of the *Los Angeles* action and only the dismissal of certain specified pleadings in the other consolidated action, leaving undismissed and unaffected other pleadings which are sufficient to form a jurisdictional basis for the appointment of your petitioner as receiver.

2.

Important Federal Questions of First Impression Which Vitally Affect the Public Interest.

The opinions of the Court of Appeals pass upon important questions of Federal procedural constitutional law which have not been but should be settled by this Honorable Court. Moreover, the decision vitally affects the safety and stability of the entire Federal Home Loan Bank and Savings and Loan systems throughout the United States. Millions of depositors and borrowers from more than fifteen hundred federal savings and loan associations, quite apart from state building and loan associations which also have business connections with Federal Home Loan Banks, are all vitally affected by the decisions of the questions presented. The entire national policy should encourage thrift and provide institutions which are impartially and efficiently as well as impersonally supervised. This is of vital concern to all persons entrusting their monies to these institutions. The manner of their administration, their stability and their effectiveness are of vital concern to the saving public and to the building trades engaged in home building, and it is important to know whether improper motives, malice and wilfulness and fraud may form a legal basis for the actions of supervising authorities who are entrusted with the fate of these institutions, even though their action otherwise remain within the formal framework of the authority conferred.

3.

Receiver Protects Savings Deposits in Custodia Legis.

Whether or not the right to review finally exists under the pleadings made in these consolidated actions, it was inevitable that large amounts of assets should find their way into the registry of the Court as the outgrowth of the controversy. These monies are largely the life savings of third parties who have no opportunity to represent themselves and protect their interests. It is of the utmost importance for courts to know in constitutional controversies of this type, even though it may eventually be decided that the constitution and federal acts have not been violated, whether courts have power, pending the litigation, to protect the assets of innocent third persons which the controversy has swept into the registry of the Court.

4.

Receiver Sole Protector of Thousands of Unrepresented Depositors.

While the assets deposited in Court represent the savings of thousands of depositors and investors, the litigation concerning them is between savings associations and Federal Home Loan banks and shareholders and stockholders of them, all of whom pursue their own particular interests and advantages. The ultimate owners of the assets, namely, the depositors, remain largely inarticulate and perhaps in most instances unaware of the titanic battle that is waged over their assets. Only a receiver can properly represent them and can properly or effectively and impartially take steps to bring actions which will preserve their interests. The necessity of bringing

these actions in the present instance is a real one. The possible causes of action which will ultimately inure to the benefit of the depositors are directed against plaintiffs, as well as defendants in the pending litigation, among others against Long Beach Association, against the conservator and against the Federal Savings & Loan Insurance Corporation.

5.

Disaster to Result if Receiver's Suits Dismissed.

San Francisco Bank, it is true, has sued Long Beach Association on respondent Ammann's note, but if this action does not succeed, and if the statute has been permitted to run in the meantime against other possible defendants, *the result will be the insolvency and bankruptcy of a Federal Home Loan Bank, whether it is the San Francisco Bank, the Los Angeles Bank or the Portland Bank.* Admittedly, San Francisco Bank does not have assets sufficient to absorb the loss of these causes of action and still remain solvent. It would be calamitous indeed if the District Court under such a situation had no power to prevent this possible result, and if the Court of Appeals could, by dismissing the action in which the receiver was appointed, deprive the receiver of an opportunity to act even before he has been heard.

Wherefore, Your Petitioner Prays that his petition for a writ of certiorari be granted and that the decision of the Court of Appeals be prevented from becoming final before the necessity or justification for his appointment has been inquired into. He therefore respectfully requests that a writ of certiorari issue under the seal of this Court, directed to the Court of Appeals for the

Ninth Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court of Appeals, had in the cases and numbered on its docket Nos. 13,411 and 13,558, as follows:

Appeal No. 13,411.

FAHEY, *et al.*,

Appellants,

vs.

HOWARD V. CALVERLEY, Receiver,

Appellee.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO,

Appellant,

vs.

HOWARD V. CALVERLEY, Receiver,

Appellee.

Appeal No. 13,558.

FAHEY, *et al.*,

Appellants,

vs.

W. I. GILBERT, JR., Attorney for Ernest R. Utley, Receiver,

Appellee.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO,

Appellant,

vs.

W. I. GILBERT, JR., Attorney for Ernest R. Utley, Receiver,

Appellee.

to the end that these causes may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgments herein of said Court of Appeals be reversed by this Court and for such further relief as to this Court may seem proper.

Dated: Los Angeles, March 24, 1954.

W. I. GILBERT, JR.,

Attorney for Ernest R. Utley as Receiver for Federal Home Loan Bank of Los Angeles, Portland or San Francisco, whichever exists.

IN THE

Supreme Court of the United States

October Term, 1953

No. .....

HOWARD V. CALVERLEY, Receiver,

Petitioner,

vs.

FAHEY, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.,*

Respondents and Appellants Below.

W. I. GILBERT, JR., Attorney for Ernest R. Utley, Receiver,

Petitioner,

vs.

FAHEY, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.,*

Respondents and Appellants Below.

Brief in Support of Petition for Writ of Certiorari.

Opinion of Courts Below.

The opinion of the Court in the appeals from the Order Appointing Receiver For The Limited Purpose of Preservation of Property On Deposit In This Court, Etc. (Appeal No. 13,411) and from the Order For Interim Allow-

ance of Costs and Expenses To Defend Appeal From Order Appointing Receiver (Appeal No. 13,558) appear in Adv. F. 2d, Vol. 208, at page 197, No. 2, issue of January 25, 1954. It is also pages 4 to 12 of the Appendix filed herewith.

Jurisdiction.

1. The date of the opinion to be reviewed is November 23, 1953, rehearing denied December 28, 1953, in Appeal Nos. 13,411 and 13,558.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is 28 U. S. C. A. 1254(1).

3. The opinion reverses the following orders of the United States District Court:

(a) The order appointing receiver dated, filed and entered March 15, 1952,

(b) Order for interim allowance of costs and expenses to defend appeal from order appointing receiver filed August 19, 1952, and docketed and entered August 20, 1952.

The opinion directs the District Court—

(a) to dismiss complaint filed by receiver in the Superior Court of the State of California, in and for the County of Los Angeles, and thereafter removed to the said District Court, and

(b) to dismiss the cross-claim filed by said receiver in consolidated action 5421-PH and 5678-PH.

This Honorable Court has power to grant certiorari when orders and judgments of the United States District Court and United States Circuit Court of Appeals are involved.

Statutes Involved.

The pertinent statutes involved are:

Home Owners Loan Act, 12 U. S. C. 1461 to 1468.

Federal Home Loan Bank Act, 12 U. S. C. 1421 to 1449.

Administrative Procedure Act, 5 U. S. C. 1001 to 1010. (App. pp. 1-3.)

Federal Interpleader Act, 28 U. S. C. 1335, 1397 and 2361.

Judicial Code, Par. 57, 28 U. S. C. 118 (now 1655).

The administrative orders involved, to wit: Orders Nos. 5082, 5083, 5084 and 388 are likewise set out in the common appendix. (App. pp. 14, 112 ff.)

Statement of the Case.

A statement of the matter involved has already been made in the preceding petition, under the heading "Statement of Matters Involved." This statement is hereby adopted and made a part of this brief.

Specification of Errors.

A. The Court erred in holding that "the District Court was without jurisdiction of the subject matter of either of said consolidated actions."

B. The Court of Appeals erred in reversing and remanding to the said District Court, Appeals Nos. 13411 and 13558 with directions to—

(1) Vacate the order appointing said receiver, dated, filed and entered March 15, 1952.

(2) Dismiss the complaint filed by said receiver in the Superior Court of the State of California, in and for the County of Los Angeles, and thereafter removed to said District Court, being action 13953-P.H. in the files of said Court.

(3) Dismiss the cross-claim filed by said receiver in consolidated actions 5421-P.H. and 5678-P.H.

(4) Vacate the "ORDER FOR INTERIM ALLOWANCE OF COSTS AND EXPENSES TO DEFEND APPEAL FROM ORDER APPOINTING RECEIVER" filed August 19, 1952 and docketed and entered August 20, 1952.

ARGUMENT.

I.

The United States District Court Had Jurisdiction Over the Consolidated Actions.

The broader aspects of the District Court's jurisdiction over the consolidated actions will not be discussed here, but we make respectful reference to the treatment of that question in other petitions of certiorari filed herein.

II.

The United States District Court Had Jurisdiction to Protect and Decide Upon the Physical Assets Which Had Been Interpled in Its Registry.

The authority of District Courts to protect assets in its registry and custody, whether by the appointment of a receiver or by other appropriate action, has uniformly been upheld.

In *United States v. Morgan* (1939), 307 U. S. 183, 83 L. Ed. 1211, the Supreme Court said at page 193 of U. S.:

> "The district court, in staying the Secretary's order . . . assumed the duty of making the proper disposition of the fund upon the termination of the litigation . . . In taking the payments into custody it acted as a court of equity, charged both *with the responsibility of protecting the fund* and of disposing of it according to law, and free in the discharge of that duty to use broad discretion in the exercise of its powers in such manner as to avoid an unjust or unlawful result. It entered into no contract or understanding with the litigants; it entered into no under-

taking as to the manner of disposing of the fund; its duty with respect to it is that prescribed by the applicable principles of law and equity for the protection of the litigants and the public, whose interests the injunction and the final disposition of the fund affect. Inland Steel Co. v. United States, 306 U. S. 153, *ante,* 557, 59 S. Ct. 415, . . ." (Emphasis added.)

In *Natural Gas. etc. v. Fed. Power Comm.* (C. C. A. 7, 1942), 128 F. 2d 481, the Court said:

". . . We have, in the exercise of our conferred power, caused a fund to accumulate, and as a court of equity, are charged with the duty of doing complete justice . . . It is placed upon us and upon us alone. We deem it our duty to retain jurisdiction and, as a court of equity, to determine to whom and in what amounts the distribution shall be made. It follows that all parties should be restrained from proceeding in other courts."

In *Market St. Ry. v. Railroad Commission* (1946), 28 Cal. 2d 363, 367, 171 P. 2d 875, 878, the Court said:

". . . The excess fares are impounded funds in the custody of the court, although they are represented by the securities on deposit . . . *this court has* the power and *the responsibility of protecting the fund* and of disposing of it in accordance with the applicable principles of law and equity *for the protection of the litigants and the public whose interests are affected* by the final disposition thereof. The court is said to be free, in the discharge of that duty and responsibility, to use broad discretion in the exercise of its powers so as to avoid an unlawful or unjust result . . ." (Emphasis added.)

In *Vallelunga v. Gomes* (1951), 102 Cal. App. 2d 374, 379, 227 P. 2d 550, 553, in disposing of a fund four years after termination of the action in which it was deposited, the Court said:

> ". . . When a court takes custody of a fund *it assumes authority and responsibility over that fund* which it does not necessarily lose upon entry of judgment or dismissal of the action. The applicable statute declares that, . . . a court may order money, or other thing capable of delivery, 'deposited in court * * * upon such conditions as may be just, subject to the further direction of the court.' Code Civ. Proc., §572 . . . This does not suggest that the court may make but a first and final order concerning a deposit. It suggests, instead, a continuing jurisdiction over the deposit throughout the period of the court's custody . . . The statute, clearly is consonant with the principle enunciated in *In re* Shyvers, D. C. Cal., S. D., 33 F. Supp. 643, that a court of equity has the duty of administering funds held in the custody of the law, distributing them to such of the parties as, after due hearing, show themselves entitled thereto, a duty which continues even after dismissal of the action in which the court gained custody . . .' . . . *Moneys paid into court to the credit of a suit in equity in the same court are to be disposed of in that suit, and no orders relating to such moneys can properly be made in another suit which does not include the same parties as the former suit.*" 262 N. W. at pages 457-458. (Emphasis added.)

"The four cases last mentioned were cited with approval by our Supreme Court in support of its statement that after dismissal of an action during

> the pendency of which a court has taken custody of a deposit, that court 'has the power to determine the disposition of funds held *in custodia legis* after notice to all parties interested.' Lord v. Superior Court, 27 Cal. 2d 855, 858, 168 P. 2d 14, 15 . . ."

California cases are cited because California law and procedure concerning deposit in court became part of federal procedure of a District Court sitting in California. (F. R. C. P. Rule No. 64.) California Code of Civil Procedure, Section 572, provides for deposit in Court of money or other assets in dispute.

It has also been uniformly held that assets *in custodia legis* are subject to the authority of the Court to protect them regardless of the outcome of the litigation.

Menasha Wooden Ware Co. v. Southern Oregon Co. (C. C. A. 9, 1917), 244 Fed. 83, wherein the Court said at page 89:

> " 'the court in which a fund has been deposited has power to order distribution of it; and when jurisdiction is once obtained it is not lost either by the abatement of the suit, or by the dismissal of the bill * * *. The court in which the fund is deposited has exclusive jurisdiction of the question of the right to the moneys, and all claims against the deposit must be asserted there.' 13 Cyc. 1038 . . ."

Where the questions presented are difficult and complicated, and where the District Court cannot decide instantly whether or to what extent it has jurisdiction, the injunctive process of the court is available to restrain temporarily any acts on the part of the litigants which would interfere with the *status quo*. This doctrine was recently announced

in *United States v. United Mine Workers,* 918 L. Ed. 884, 910-911, 330 U. S. 258, 289-290, where we read:

> "The government's complaint sought a declaratory judgment in respect to the right of the defendants to terminate the contract by unilateral action. What amounted to a strike call, effective at midnight on November 20, had been issued by the defendant Lewis as an 'official notice.' Pending a determination of defendants' right to take this action, the Government requested a temporary restraining order and injunctive relief. The memorandum in support of the restraining order seriously urged the inapplicability of the Norris-LaGuardia Act to the facts of this case, and the power of the District Court to grant the ancillary relief depended in great part upon the resolution of this jurisdictional question. In these circumstances, *the District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction.*" (Emphasis added.)

If there is equitable power in the courts to enjoin interference with its processes until it can decide whether it has jurisdiction, then by analogy, and *a fortiori,* it must have the equitable power—especially where vital interests of third persons are involved and institutions vital to the general public are threatened with possible insolvency—to appoint a receiver to protect the assets in question until it is decided whether it has jurisdiction. When separate appeals are taken from such an order appointing a receiver, an independent and considered inquiry into the validity of the appointment ought not to be foreclosed by an appellate court summarily dismissing the action before the receiver has even been heard.

III.

If a Constitutional or Federal Question Is Properly Stated, the Complaint Draws With It Into the Jurisdiction of the District Court All Other Matter Raised in the Complaint and the District Court Has Continuing Power to Dispose of All Issues Even Though the Federal or Constitutional Questions Are Decided Against the Persons Raising Them.

If the jurisdiction of the District Court has been properly invoked by raising constitutional or federal questions, the power of the District Court extends to every issue raised in the case regardless of the final outcome of the constitutional or federal issue.

In *R. R. Com. of Cal. v. Pacific G. & E. Co.,* 302 U. S. 388, 82 L. Ed. 319, U. S. Supreme Court 1938, the Court said at page 391 of U. S.:

> ". . . Because of the federal question raised by the bill of complaint, the District Court had jurisdiction to determine all the questions in the case, local as well as federal . . . (citing authorities) . . ."

In *Sterling v. Constantin,* 287 U. S. 378, 77 L. Ed. 375, U. S. Supreme Court 1932, the Supreme Court said at page 393 of U. S.:

> "As the validity of provisions of the state constitution and statutes, . . . are challenged, the application for injunction was properly heard by three judges . . . *the jurisdiction* of the District Court so constituted, and of this Court upon appeal, *extends to every question involved,* . . ." (Emphasis added.)

IV.

Holding Statutes Constitutional Does Not Deprive Court of Jurisdiction.

The original complaints in No. 5421 (the *Mallonee* action), and in No. 5678 (the *Los Angeles Bank* action), and also some amended, supplemental, and later pleadings, alleged a violation of the United States Constitution and of federal acts, so that the District Court's jurisdiction was properly invoked.

The three-judge Court in September of 1946, unanimously decided that Section 5(d) of the Home Owners' Loan Act was unconstitutional. The United States Supreme Court in 1947 reversed and held the Act constitutional. Neither decision could alter or remove the jurisdiction of the District Court properly invoked on the constitutional questions in the first instance.

Jurisdiction does not ebb and flow with the successive denials of writs, reversals of judgments, or other proceedings in the many writs and appeals, and six and one-half years of litigation.

Once invoked by the charge of unconstitutional seizure, the jurisdiction of the Federal Court remains until the final decision of the last issue on the merits.

In deciding the validity of the appointment by a Federal Court of a receiver for a state savings and loan association, the Court said in *Pennsylvania v. Williams,* 294

U. S. 176, 79 L. Ed. 841, U. S. Supreme Court (1935), and companion cases.[5]

> ". . . the present bill of complaint . . . properly invokes the power and the authority, conferred upon the district court by the Constitution and statutes of the United States, to entertain the suit. The bill . . . prays relief which a federal court of equity is competent to give . . .
>
> ". . .
>
> ". . . the district court was not without jurisdiction as a federal court, for these are questions which it is competent to decide. It was therefore invested with authority to hear and make disposition, of the cause, . . .
>
> ". . . The relief sought, an injunction and the appointment of receivers, was aimed at the prevention of irreparable injury from the waste of the assets . . ."

Jurisdiction to decide whether the complaint is sufficient to state a cause of action includes jurisdiction to appoint a receiver to preserve the assets held for six or more years in the registry of the District Court, pending repeated appeals.

In *Bell v. Hood* (1946), 327 U. S. 678, 90 L. Ed. 939, the Supreme Court said at page 682 of the U. S.:

> "Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover . . .

---

[5]*Pennsylvania General Casualty v. Schnader,* 294 U. S. 189, 79 L. Ed. 850, U. S. Supreme Court (1935); *Gordon v. Ominsky,* 294 U. S. 186, 79 L. Ed. 848, Supreme Court (1935)

> Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy . . ."

The eventual outcome of the litigation, either in favor of, or against, the sufficiency of the original pleadings, is not decisive of the jurisdiction of the District Court to preserve the subject matter of the litigation for final decision by either the Court of Appeals or the United States Supreme Court.

In *Binderup v. Pathe Exchange* (1923), 263 U. S. 291, 68 L. Ed. 308, the Supreme Court said at page 305 of the U. S.:

> "Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a Federal statute presents a case within the jurisdiction of the court as a Federal court; and this *jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged* any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way, upon either question, is predicated upon the existence of jurisdiction, not upon the absence of it . . ." (Emphasis added.)

In *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.,* 341 U. S. 246, 95 L. Ed. 912 (1951), the Court said at pages 248-249 of U. S.:

> "The judgment was reversed by the Court of Appeals for the Eighth Circuit on the ground that the District Court was without jurisdiction.

> "As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action. The Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions. Petitioner asserted a cause of action under the Power Act. To determine whether that claim is well founded, the District Court must take jurisdiction, whether its ultimate resolution is to be in the affirmative or the negative. If the complaint raises a federal question, the mere claim confers power to decide that it has no merit, as well as to decide that it has . . ."

The Supreme Court has said that in certain types of litigation the question of jurisdiction cannot be decided until a decision on the merits. If such a decision on the merits is postponed for six or more years, past the expiration of all applicable statutes of limitation, the District Court into whose custody $14,000,000.00 of savings deposits are interpled, must possess sufficient jurisdiction to preserve and protect the deposited savings. Otherwise, the eventual decision of the merits may be a nullity if the statute of limitations has run and the deposited savings have become valueless.

The Supreme Court recognized this situation and said in *Land v. Dollar* (1947), 330 U. S. 731, 91 L. Ed. 1209, at page 735 of the U. S.:

> ". . . although as a general rule the District Court would have authority to consider questions of jurisdiction on the basis of affidavits as well as the pleadings, *this is the type of case where the ques-*

tion of jurisdiction is dependent on decision of the merits. . . .

"The allegations of the complaint, if proved, would establish that petitioners are unlawfully withholding respondents' property under the claim that it belongs to the United States. . . .

"If respondents are right in these contentions, their claim rests on their right under general law to recover possession of specific property wrongfully withheld. At common law their suit as pledgors to recover the pledged property on payment of the debt would sound in tort."

Further:

". . . But public officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, . . . the victim . . . may bring his possessory action to reclaim that which is wrongfully withheld.

"It is in the latter category that the pleadings have cast this case . . .

". . . We only hold that the District Court had jurisdiction to determine its jurisdiction by proceeding to a decision on the merits." (Emphasis added.)

Conclusion.

The Orders of the Court of Appeals together with the directions to the District Court as they appear in 208 Adv. F. 2d 197 (App. pp. 4-12) and as far as they pertain to your petitioner, are unprecedented. In one sense they enlarge upon, and in another they directly nullify the effect of previous decisions in the same case

which had become final by reason of this Honorable Court's denial of certiorari and in a similar sense they enlarge and nullify the mandate of the Court of Appeals based on these final decisions.

The action of the Court of Appeals is unprecedented not only in that it remands appeals, the merits of which it was in no position to pass upon due to the absence of a printed record, but it is unprecedented also in that it directs the dismissal of actions which in no sense of the word could be considered to be before it.

In effect, therefore, it approves the arbitrary refusal of the San Francisco Bank to institute causes of action which would inure to the benefit of the stockholders of the San Francisco Bank and eventually to the benefit of many depositors in numerous Federal savings and loan associations.

Thus the action of the Court of Appeals not only is of immediate and grave concern to all stockholders of the San Francisco Bank and all depositors of its member associations, but beyond that, it presents questions of judicial procedure which certainly are of import beyond the immediate scope of this case. It is surely unusual, to say the least, to dismiss appeals in an action which previous opinions and mandate of the Court of Appeals have left partially pending and to accomplish or justify this by giving previous opinions a meaning and effect which those opinions—now final—never had.

A reading of all opinions in the same consolidated case, 196 F. 2d 366, 200 F. 2d 420, and 208 Adv. F. 2d 197, clearly shows, patent for everyone to see, that the last of these opinions is inconsistent with, and goes beyond, the adjudication of the previous ones.

If the questions discussed in the opinions were of small concern and touched a few individuals only, the matter might not be urgent, but in this case large questions of administrative law, judicial procedure and financial policy which the Federal Government has undertaken to protect, are involved, and therefore a case is presented which, we submit, should be reviewed by this Honorable Court on certiorari.

Respectfully submitted,

W. I. GILBERT, JR.,

Attorney for Ernest R. Utley, Receiver for Federal Home Loan Bank of Los Angeles, Portland or San Francisco, whichever exists.

Appendix Reference.

To prevent repetition in the several petitions for certiorari, a combined appendix by certain petitioners is filed herewith, bound as a separate volume. All appendix references in this petition are to such bound appendix.